2016 IL App (1st) 151578-U
No. 1-15-1578
June 27, 2017

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BRUCE LIVINGSTON,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellant,	)	
	)	No. 12 L 14416
v.	)	
	)	
ZANE SMITH,	)	The Honorable
	)	Patrick J. Sherlock,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: An attorney who signs a consulting contract is not personally liable if his client is disclosed by being named in the contract or by signing the contract.

¶ 2 Bruce Livingston, a consultant, filed a breach of contract action against Zane Smith, an attorney, that was based on a Medical Consultation Agreement (MCA) that was signed by Smith and by his client, Rose Newsome. Prior to trial, the trial court found that language in the MCA was ambiguous and that extrinsic evidence could be used to determine the intent of the parties. After the trial, the trial court found that language in the MCA did not make Smith personally

liable for Livingston's consulting fees even if he signed the contract, and that Smith did not breach the MCA because he placed Rose's settlement funds in escrow and disbursed Rose's disputed settlement funds pursuant to the trial court's order.

¶ 3 We agree with the trial court that language in the MCA was ambiguous, and that Smith's signature on the MCA did not make Smith personally liable for Livingston's consulting fees because Rose signed the MCA and was disclosed as a party to the contract. Accordingly, we hold the trial court did not err when it entered a judgment for Smith.

¶ 4 BACKGROUND

¶ 5 On March 12, 1995, Rose Newsome (Rose) was treated at the University of Illinois Hospital and she maintained that, while being treated, she sustained a brain injury. On July 21, 1999, Rose and her husband Halter Newsome (Halter) entered into a contract with Zane Smith (Smith), a member of Smith, Hurd, & Associates, Ltd, and employed him to represent them in a medical malpractice lawsuit against the defendants, Gerard Debrun, M.D., James I. Ausman, M.D., Ben-Zio Roitberg, M.D., and the University of Illinois Hospital.

¶ 6 After a discussion with the Newsomes, Smith hired Dr. Bruce Livingston (Livingston) as a consulting medical expert to assist him with Rose's medical malpractice case. In October 1999, Livingston drafted and signed a medical consultation agreement (MCA), and sent it to Smith, who signed the MCA and was present when Rose and Halter signed the MCA. The MCA provides, in pertinent part, as follows:

"Medical Consultation Agreement

(S.Ct.Rule 201(b)(3))

BY AND BETWEEN

Bruce Livingston

AND

Rose Newsome

And

Attorney Zane Smith

Re: Newsome vs. UIC et al.

* * *

1. "Livingston" shall provide medical assistance in the prosecution of this case as a medical consultant as defined by Illinois Supreme Court 201(b)(3). "Livingston" shall perform any or all of the following duties as may be needed; attend medical depositions, medical research, assist counsel to prepare for the medical aspects of trial and attend trial.

2. "Livingston" shall be paid 15% of the gross recovery in this matter at the time that the first disbursement is made and which shall be on a contingent basis. The amount of compensation to LIVINGSTON takes into account the risk which is involved to "LIVINGSTON" by virtue of the contingent nature of his fee, the benefit conferred to the client(s), the complexity of the case, the estimated total value of the case and the skill, expertise and experience of "LIVINGSTON" in this field. In the event that for any reason it shall become relevant the hourly charge by "LIVINGSTON" shall be $500.00.

By their execution of this document plaintiff's attorney(s) acknowledge that he benefits from Livingston's efforts herewith and agrees to all of the terms of this agreement.

3. "Livingston" shall have a lien in this matter for the amount of his fee in addition to attorney's fees sufficient to pay for the services of a leading law firm in this community *** to enforce this lien or to file a lawsuit or both. *** The attorney(s) will directly pay "Livingston" his contractual share pursuant to this agreement unless ordered to the contrary by a court of competent jurisdiction. Should any portion of Livingston's fee not be paid then the parties authorize Livingston to take a default judgment against them for his entire fee plus costs, interest and attorney's fees.

* * *

7. In the event that an installment or periodic payment is established in this matter then "Livingston" shall be paid in full out of the initial "lump sum" proceeds.

8. This is a fully integrated contract. No representations not expressly contained herein have been made by any party and any and all prior or contemporaneous agreements are hereby merged herein. This contract shall be construed by the "four corners rule."

9. In the event that any part of this agreement is declared unenforceable for any reason than the remaining portions of the agreement shall remain in full force and effect.

10. Execution of this agreement entitles "Livingston" to his full fee in case of settlement of this case without a trial. It is understood and agreed that the very fact that "Livingston" is present on the case may be an inducement for the defendant(s) to settle. Moreover, early identification of controlling medical issues by "Livingston" may so posture the plaintiff's case that defense of the action falters at an early stage. The possibility of an early resolution of the case is one of the reasons that "Livingston" is being retained. The parties agree that should this matter be resolved quickly that "Livingston" is entitled to his total fee even though he will not have accumulated many hours of time on the case.

11. Notwithstanding any language to the contrary, Livingston shall allow counsel and client(s), an opportunity to review his bill before payment is made. In the event that an issue arises regarding the bill which the parties and counsel are unable to resolve through discussion of the bill then the entire disputed portion of the fee claimed by Livingston, plus attorney's fees, interest and costs shall be set aside in an escrow account until a court of competent jurisdiction rules on the fee issue. Undisputed fees shall be paid to Livingston immediately. Counsel guarantees the safe-guarding and integrity of the funds, aforesaid, at this point. Counsel assumes the responsibility of the

> entire award due Livingston should these funds be dissipated. The forum for such review shall be at the discretion of Livingston."

¶ 7 On December 21, 2012, Livingston filed a breach of contract action, based on the MCA, against Smith for his medical consulting fees. The parties filed cross motions for summary judgment. On January 22, 2015, the trial court found that the MCA was ambiguous, that extrinsic evidence was necessary to explain the intent of the parties, and denied both motions for summary judgment.

¶ 8 On March 11, 2015, Smith filed another motion for summary judgment arguing that he complied with the MCA by depositing the funds in an escrow account. Livingston filed a motion *in limine* to prohibit Smith from offering or introducing any extrinsic evidence to refute Smith's personal liability under the agreement. Smith filed motions *in limine* to prohibit the plaintiff from using any remark, statement, question, impeachment, cross-examination, argument, expert testimony, or inference that might be prejudicial.

¶ 9 On April 24, 2015, the trial court entered an order which denied Smith's motion for summary judgment, and denied Livingston's motion in limine. The order also granted some of Smith's motions in limine, denied others, and set the case for trial.

¶ 10 On May 4, 2015, a bench trial was held, and Livingston and Smith testified. Livingston testified on direct that when drafting the agreement, he intended to obligate Rose and Smith. To demonstrate his intention to hold Smith personally liable, Livingston read paragraphs three and eleven from the MCA, and testified that Smith (i) must pay Livingston his contractual share unless a court of competent jurisdiction rules on the fee issue; (ii) guaranteed the safeguarding and integrity of the funds; and (iii) assumed responsibility for Livingston's award should the

funds be dissipated. Livingston testified on cross that Smith did not distribute any settlement funds in violation of the court's order.

¶ 11 Smith testified on direct that after the Newsomes stated that they did not plan on paying anyone, Smith filed a petition for additional fees in Rose's malpractice case, which included Livingston's consulting fees, but the motion was denied and Livingston was not awarded any fees. Smith also testified that the MCA obligated him to protect any fees which Livingston was awarded, and he believed that he honored his obligation by placing the settlement funds in an escrow account where they remained until the court ordered their disbursement. Smith further testified that when Livingston filed a petition for fees against the Newsomes seeking payment in Rose's malpractice case, he provided an affidavit in which he averred that Livingston provided a valuable service by helping the Newsomes reach a settlement. Finally, Smith testified that the Newsomes fired him the day after the court granted the motion to enforce the settlement, and that December 1, 2003 was the last day he had control over any of the settlement funds and the last day he worked on Newsome's case.

¶ 12 Smith testified on redirect that he was not personally liable under the MCA for paying Livingston's fee as long as he did not dissipate the escrow funds or violate his duty to safeguard the escrowed funds pending the court's decision to disburse the funds. Smith further testified that he was obligated to protect the funds to ensure that Livingston was paid in the event a court approved his consulting fees. Finally, Smith testified that Livingston's consulting fees were never approved, so he never paid Livingston's bill for consulting fees.

¶ 13 At the conclusion of the trial, the trial court found that language in the MCA did not provide that Smith was obligated to pay Livingston's 15% contingency fee. Rather, the trial court

found that the terms of the MCA only required Smith to safeguard the integrity of any funds that were in dispute. The trial court further found that there was a dispute regarding Livingston's fees and Livingston was never awarded his consulting fees according to the court orders admitted into evidence. The trial court found that Smith safeguarded the escrowed funds that were in dispute when he set them aside in a special account that remained under his control until the court ordered him to disburse the funds. The trial court found that there was an ambiguity in paragraph three regarding Smith's personal liability for Livingston's consulting fees, but found that the contract as a whole only required Smith to pay 15% from the settlement proceeds based on a court order. Finally, the trial court found that Smith fulfilled his contractual obligations and did more than he was contractually obligated to do and entered a judgment in favor of Smith.

¶ 14 On June 1, 2015, Livingston filed a timely notice of appeal. On June 10, 2015, Smith filed a notice of cross appeal of the April 24, 2015 order denying Smith's cross motion for summary judgment.

¶ 15 ANALYSIS

¶ 16 Interlocutory Orders

¶ 17 The threshold issue raised by Livingston in his appeal and by Smith in his cross-appeal is whether the trial court erred when it denied Livingston's and Smith's motions for summary judgment. As a general rule, when a motion for summary judgment is denied and the case proceeds to trial, the denial of a motion for summary judgment is not reversible on appeal because the result of any error is merged into the judgment entered at trial. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355 (2002); *Smith v. American Heartland Ins. Co. and Pearson*, 2017 IL App (1st) 161144, ¶ 19; *Paulson v. Suson*, 97 Ill. App. 3d 326,

328 (1981). Supreme Court Rule 303 provides that a final judgment is generally a prerequisite to appellate jurisdiction (Ill. S. Ct. R. 303 (eff. Jan. 1, 2015)), and an order denying a motion for summary judgment is interlocutory and does not vest the appellate court with jurisdiction. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 357 (1999). Because an order denying a motion for summary judgment is not a final order, it is not appealable standing alone unless the order is one of the interlocutory orders authorized by Supreme Court Rules 306, 307, or 308 to confer jurisdiction on the appellate court. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 472 (1998); *People ex. rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981); Ill. S. Ct. R. 306 (eff. Mar. 8, 2016); Ill. S. Ct. R. 307 (eff. Jan. 1, 2016); Ill. S. Ct. R. 308 (eff. Jan. 1, 2016). The interlocutory orders denying Livingston's and Smith's motions for summary judgment were not final orders as defined by Rule 303 (Ill. S. Ct. R. 303 (eff. Jan. 1, 2015)) nor were they one of the authorized interlocutory orders that can be appealed to the appellate court by permission, by right, or by certification of a question pursuant to Rules 306, 307, or 308. Ill. S. Ct. R. 306 (eff. Mar. 8, 2016); Ill. S. Ct. R. 307 (eff. Jan. 1, 2016); Ill. S. Ct. R. 308 (eff. Jan. 1, 2016). Accordingly, we cannot review the trial court’s interlocutory orders denying Livingston’s and Smith's motions for summary judgment because those interlocutory orders do not confer jurisdiction on this court. See Ill. S. Ct. R. 303 (eff. Jan. 1, 2015); Ill. S. Ct. R. 306 (eff. Mar. 8, 2016); Ill. S. Ct. R. 307 (eff. Jan. 1, 2016); Ill. S. Ct. R. 308 (eff. Jan. 1, 2016).

¶ 18 The Trial Court's Judgment

¶ 19 Next, we must determine whether the trial court erred when it entered a judgment for Smith after a bench trial. Generally, in a bench trial, the standard of review is whether the order or judgment is against the manifest weight of the evidence. *Reliable Fire Equipment Co. v.*

Arredondo, 2011 IL 111871, ¶ 12; *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002); *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425, 433 (1991).

¶ 20 The Trial Court's Finding that the MCA was Ambiguous

¶ 21 We note that the trial court denied the parties' cross motions for summary judgment and ordered a trial because the MCA was ambiguous. Before we determine whether the trial court's judgment was against the manifest weight of the evidence, we must first address the trial court's findings that the MCA was ambiguous and that extrinsic evidence should be used to determine the intent of the parties.

¶ 22 The construction or interpretation of the MCA, a contract, presents a question of law which we review *de novo*. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). The primary objective in construing a contract is to give effect to the intent of the parties. *Gallagher*, 226 Ill. 2d at 232; *Virginia Sur. Co., Inc. v. Northern Ins. Company of New York*, 224 Ill. 2d 550, 556 (2007). A court must initially look to the language of the contract alone, as the language, given its plain ordinary meaning, is the best indication of the parties' intent. *Gallagher*, 226 Ill. 2d at 233; *Northern Ins. Company of New York*, 224 Ill. 2d at 556; *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). The intent of the parties is not gathered from detached portions of a contract or from any clause or provision standing by itself, but, rather, the contract must be construed as whole, viewing each part in light of the others. *Gallagher*, 226 Ill. 2d at 233; *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 98 Ill. 2d 109, 122 (1983). If the language of the contract is susceptible to more than one meaning, it is ambiguous. *Gallagher*, 226 Ill. 2d at 233; *Farm Credit v. Whitlock*, 144 Ill. 2d 440, 447 (1991). When a court determines

that a contract is ambiguous, as the trial court did in this case, extrinsic evidence is admissible to ascertain the parties' intent. *Gallagher*, 226 Ill. 2d at 232; *Whitlock*, 144 Ill. 2d at 447.

¶ 23 Here, we must construe the MCA as whole, viewing each provision in light of the others as the Illinois Supreme Court directs. *Gallagher*, 226 Ill. 2d at 233; *Dow Jones & Co.*, 98 Ill. 2d at 122.

¶ 24 Livingston argues that there were three parties to the MCA, Livingston, Rose Newsome, and Smith, and that an analysis of the MCA establishes that both Rose and Smith are liable for his consulting fees. We note, however, that the appellate court previously held that Rose was incompetent and that she was not liable for Livingston's consulting fees. See *In Re of Estate of Rose Newsome v. Roitberg, Phillips, & Karpen v. Livingston*, No. 1-06-1913 (2009). (Unpublished order under Supreme Court Rule 23). Therefore, because this court previously held that Rose was not liable to Livingston under the MCA, the question of Rose's liability is not before this court and we will limit our review to Smith's liability.

¶ 25 Livingston further argues that paragraphs two, three, and eleven establish Smith's obligation to pay. Livingston also argues that paragraph two states the terms and Smith agreed to all of the terms of the agreement. We find that paragraph two provides that Livingston must be paid 15% of the gross recovery in this matter and that Smith agrees to all of the terms of the MCA. Livingston argues that this provision personally obligates Smith to pay Livingston's fee. We also find that the language in paragraph two is ambiguous because it is susceptible to more than one meaning and does not state which party agrees to pay Livingston's consulting fees. *Gallagher*, 226 Ill. 2d at 232; *Teachers Realty Corp.*, 185 Ill. 2d at 462. We further find that the language, "Livingston must be paid 15% of the gross recovery of this matter," refers to recovery

from Rose's case. We failed to find evidence in the record that Smith had a pending matter or a case that the consulting fee of "15% of the gross recovery" could be taken from.

¶ 26 Next, Livingston argues that he was granted a lien in paragraph three, and that Smith accepted this lien individually. We find that paragraph three provides that the attorney will pay Livingston his contractual share unless ordered to the contrary by a court of competent jurisdiction. While Smith agreed to pay Livingston his "contractual share" unless a court ordered to the contrary, we find paragraph three to be susceptible to more than one meaning because it contains no express language requiring Smith to pay Livingston's consulting fee, and the language does not make Smith personally responsible for Livingston's consultant's lien. *Gallagher*, 226 Ill. 2d at 232; *Teachers Realty Corp.*, 185 Ill. 2d at 462.

¶ 27 Finally, Livingston argues that Smith agreed in paragraph eleven to safeguard the funds in the award, and that Smith assumed responsibility for the funds if they were dissipated. We find that paragraph eleven provides that if there is an issue regarding Livingston's bill which the parties and counsel cannot resolve, the entire disputed portion of Livingston's fee must be set aside in an escrow account until a court of competent jurisdiction rules on the fee. We agree with Livingston that paragraph eleven provides that counsel guarantees the safeguarding and integrity of the funds but there is no language in paragraph 11 that Smith agrees to be personally liable for Livingston’s consulting fees. *Gallagher*, 226 Ill. 2d at 232; *Teachers Realty Corp.*, 185 Ill. 2d at 462. We note that a court order entered in Rose’s malpractice case directed Smith to set aside the settlement funds, including Livingston's consulting fees, in an escrow account until further order of the court. Smith complied with the court's order by safeguarding the disputed funds, and by disbursing the funds as directed by the court's order. Thus, we find that the settlement funds held

in escrow were not dissipated because Smith placed the funds in escrow and disbursed the funds as directed by the court's order.

¶ 28 While we find that the language in paragraphs two, three, and eleven of the MCA is ambiguous because it is susceptible to more than one meaning and there is no language indicating that Smith, one of the parties to the contract, agreed to pay Livingston's consulting fees (*Gallagher*, 226 Ill. 2d at 232; *Teachers Realty Corp.*, 185 Ill. 2d at 462), we also find that when the MCA is construed as a whole, the MCA only obligated Smith to protect any settlement funds that were in dispute. We find that Livingston's consulting fees were in dispute and that Smith fulfilled his contractual obligation under the MCA by placing the disputed funds in an escrow account. We found no language in the MCA which indicated that Smith agreed to be personally liable for Livingston's consulting fees. Accordingly, we agree with the trial court that the MCA was ambiguous, and therefore, hold that the trial court correctly permitted extrinsic evidence to be introduced at trial to determine the intent of the parties.

¶ 29 The Evidence Supports the Trial Court’s Judgment

¶ 30 Now that we have found that the MCA was ambiguous, we must examine the evidence presented by the parties at trial to determine whether the trial court's judgment was against the manifest weight of the evidence. The trial court's judgment that Smith was not personally liable for paying Livingston's medical consulting fees will not be disturbed on appeal unless the judgment is contrary to the manifest weight of the evidence. *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill. 2d 213, 242 (1996). A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly evident or when the finding itself is so unreasonable, arbitrary, or not based on the evidence. *Best v. Best*, 223 Ill. 2d 342, 350 (2006); *Rhodes*, 172 Ill. 2d at

242. Under a manifest weight of the evidence standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and the witnesses and has a degree of familiarity with the evidence that we, as a reviewing court, cannot possibly obtain. *In Re D.F.*, 201 Ill. 2d 476, 498-99 (2002); *In Re A.P.*, 179 Ill. 2d 184, 204 (1997). We, therefore, must not substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given or the inferences to be drawn from the evidence. *In Re D.F.*, 201 Ill. 2d 476, 499 (2002).

¶ 31 Here, the MCA, which was admitted in evidence as an exhibit at trial, (i) contained no language that Smith agreed to pay Livingston's consulting fees; (ii) required Smith to safeguard Livingston's consulting fees if there was a dispute; and (iii) directed Smith to set aside the disputed funds in an escrow account until a court order decides the fee issue. The September 12, 2003 and November 12, 2003 court orders from Rose's malpractice case that were admitted in evidence during the trial established that Livingston's consulting fees were in dispute, that the court ordered Smith to place the disputed funds in escrow, and that the court directed Smith on how to disburse the funds. We note that Livingston testified that Smith did not distribute any funds in violation of the court's order. Finally, Smith testified that Livingston's consulting fees were never approved, so he never paid Livingston's bill for consulting fees.

¶ 32 Livingston argues that Smith signed the MCA as an individual, rather than as an agent or attorney for Rose, and that because Smith signed the MCA as an individual, he was personally liable for fulfilling the terms of the MCA by paying Livingston's consulting fees. Livingston cites *Bank of Pawnee v. Joslin*, 166 Ill. App. 3d 927, 935 (1988) in support of his position.

¶ 33 In order to determine whether Smith's signature on the MCA makes him personally liable for Livingston's consulting fees, we must first determine whether Smith signed the contract as an individual or in a representative capacity as an agent. Case law teaches us that in order to determine whether a party signing a contract is bound as an individual, or in a representative capacity, the determination is made by examining the facts. *Knightsbridge Realty Partners, Ltd.-75 v. Pace*, 101 Ill. App. 3d 49, 53 (1981). Illinois case law is clear that the agent of a disclosed principal is not personally bound by the terms of a contract that he executes on behalf of his principal unless he agrees to be personally liable. *Pace*, 101 Ill. App. 3d at 53; *Western Cas. & Sur. Co. v. Bauman Ins. Agency, Inc.*, 81 Ill. App. 3d 485, 486 (1980).

¶ 34 Here, the facts reveal that Smith contacted Livingston as Rose's attorney and requested assistance on Rose's medical malpractice lawsuit. After agreeing to act as a consultant, Livingston drafted the MCA and sent it to Smith who, along with Rose and her husband, Halter, signed the MCA. Because Rose was named in the contract and signed the contract, she was a disclosed client, and because Smith was named on the MCA and signed his name on the signature line above his typed name and the characters "Esq.," we find that Smith signed the MCA in a representative capacity as Rose's attorney, rather than as an individual. Courts takes judicial notice of abbreviations which are in common use (*People v. Thompson*, 295 Ill. 187, 190 (1920)), and the characters Esq. are in common use and are an abbreviation for Esquire, a title appended after the name of a lawyer. Black's Law Dictionary, 585 (8th ed. 2004). Therefore, because the MCA contained no language that Smith agreed to pay Livingston's consulting fees, we find that Smith is not liable because he signed the MCA in a representative capacity as a

lawyer for Rose his disclosed client. *Pace*, 101 Ill. App. 3d at 53; *Western Cas. & Sur. Co.*, 81 Ill. App. 3d at 486.

¶ 35 We also find that Livingston's reliance on *Joslin* is misplaced because *Joslin* involved an undisclosed principal and, here, we found that Rose was a disclosed principal. Therefore, *Joslin* does not support Livingston's position. See *Joslin*, 166 Ill. App. 3d at 935.

¶ 36 Finally, we find, after reviewing the documentary and testimonial evidence introduced at trial, that the trial court's judgment for Smith was not against the manifest weight of the evidence. Accordingly, we hold that the trial court did not err when it entered a judgment for Smith.

¶ 37 Affirmed.